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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No. 967

Estate of Hutchen Upshaw, Deceased
Ardenia Upshaw, Administratrix, and
Ardenia Upshaw, Individually,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. _____

Estate of Hutchen Upshaw, Deceased, Ardenia Upshaw, Administratrix, and Ardenia Upshaw, Individually,	)
Petitioners,	)
v.	)
Commissioner of Internal Revenue,	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Estate of Hutchen Upshaw, Deceased, Ardenia Upshaw, Administratrix, and Ardenia Upshaw, individually, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Seventh Circuit dated and entered in this proceeding on September 23, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Tax Court opinion, in the Appendix, is T.C. Memo 1968-123 (C.C.H.-27 TCM 593).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered on September 23, 1969. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. Sec. 1254(1), and 26 U.S.C. 7482(a).

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether or not Sections 51(b) of the 1939 Code, and the similar provisions of Section 6013(d)(3) of the 1954 Code, concerning joint and several joint liability, as applied by the Seventh Circuit Court of Appeals to the facts of this consolidated case with particular regard to taxpayer's widow, are consistent with the Fifth Amendment to the Constitution of the United States of America, viz.:

a) When such decision holds a widow liable for additional taxes and fraud penalties, notwithstanding lack of evidence of any income by her, lack of evidence of her fraudulent conduct, lack of evidence of her execution of tax returns and lack of evidence of knowledge and of fraudulent

intent on her part.

b) When such decision fails to relieve a party of her stipulation when necessary to prevent an injustice, and where all facts relating thereto, contrary to the recitals of the stipulation, are established by the evidence.

2. Whether or not a conflict exists between the various Circuits requiring the Supreme Court to assume jurisdiction to accomplish uniformity in the administration of the Federal Income Tax laws, viz.:

a) Whether the decision of the Seventh Circuit Court of Appeals herein conflicts with the Decision of the Eighth Court of Appeals in Payne v. U.S. 247 F (2d) 481, and the Ninth Circuit Court of Appeals in Furnish v. Commr., 262 F (2d) 727, on the matter of "fairness".

3. Whether the decision below raises significant and recurring problems concerning application of the Holland v. U.S., and allied net-worth cases concerning how to arrive at correct and accurate tax liability.

4. Whether the Internal Revenue service, an administrative agency, violates the basic concept of separation of powers, by imposing arbitrary methods of computations in the reconstruction of a taxpayer's income.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved appear in the appendix and are as follows, viz.:

Constitution

Fifth Amendment.

Statutes

Internal Revenue Code of 1954:

Section 63(a)

Section 161

Section 261

Section 275

Section 6013(d)(3).

STATEMENT OF THE CASE

Hutchen Upshaw and Ardenia Upshaw were husband and wife residing in Gary, Indiana. For the years 1954-1957 Hutchen Upshaw filed individual returns in which Ardenia Upshaw did not join. A major controversy, however, exists as to whether or not the returns filed for 1953 and 1958 were joint income tax returns. Taxpayer Ardenia Upshaw did not sign the returns which were appended to a stipulation referring to said returns as "joint". Such returns were signed by an accoun tant whose power of attorney did not authorize signing of tax returns. Ardenia Upshaw had no income in 1953 and 1958 and no responsibility for filing income tax returns for such years.

The Commissioner of Internal Revenue assessed deficiencies in reported income

for the six years involved and computed tax, penalties and interest thereon, among other things, imposing tax liabilities and fraud penalties against Ardenia Upshaw for the years 1953 and 1958. On September 27, 1961, Hutchen and Ardenia Upshaw and Hutchen Upshaw filed their Petitions with the Tax Court asking for a re-determination of such deficiencies. The two actions in the Tax Court were consolidated for trial and opinion. After trial the Tax Court issued its opinion upholding the commissioner's deficiency computations. The parties appealed and the Seventh Circuit affirmed the Tax Court. The precise amounts of alleged understatement, tax, additions to taxes and interest each are set forth in the opinion of the Circuit Court of Appeals in the Appendix hereto. Additional facts

of the case are set forth in said opinion of the Circuit Court, upon pages 3-5 thereof. The Circuit Court of Appeals examined the fraud issue, the issue of the widow's liability for the additions to tax for the years 1953 and 1958 and the issue of the Statute of Limitations, and decided all issues against petitioners. The Circuit Court of Appeals also agreed with petitioners that as a matter of good accounting practice accrued federal income tax liability should be deducted in computing taxpayer's net worth, but held such deduction "both impossible and impermissible" in a net worth, non-deductible expenditures computation.

REASONS FOR GRANTING THE WRIT

1. The decision below is inconsistent with the Fifth Amendment in that, it holds a widow liable for taxes and fraud penalities, notwithstanding lack of evidence of income to her, lack of evidence of her fraudulent conduct, lack of evidence of her execution of returns, and lack of evidence of knowledge and fraudulent intent on her part.

Section 59(b) of the 1939 Code and the comparable section 6013(d)(3) of the 1954 Code, each impose joint and several liability upon Taxpayers if a joint income tax return is made. In reliance upon the stipulation, and disregarding the primary evidence attached thereto, the Seventh Circuit here held the widow liable for taxes and fraud penalities, although there

is no evidence that she signed the returns, no evidence that she authorized the signing of the returns on her behalf, no evidence of any income to her, and no evidence of knowledge or fraudulent intent at the time to willfully evade income taxes due by her then husband.

Concerning Ardenia Upshaw, widow, the decision below, among other things, releases the government of its statutory burden of proof on the issue of fraud in that none of the actions cited as proof of her husband's fraud are shown to have been done either by him with her knowledge or to have been done by her.

2. The decision below conflicts with the decisions of other courts of appeal.

In the Eight Circuit Payne decision, 247 F (2d) 481, and the Ninth Circuit

Furnish decision, 262 F (2d) 727, the concept of "fairness" was applied in the application of Section 26 USCA 6013(d)(3). In the instant case, the Seventh Circuit does not even make reference to such equitable concept, although the facts clearly required its utilization. This equitable concept of "fairness" is essential to the implementation of the Fifth Amendment. As the Eighth Circuit noted, although, under the statute, the act of placing a signature upon a return may entitle the return to be regarded as a "joint return," "there is no statute or rule of law that makes such a situation absolute and conclusive, so that (it) * would be incapable of being * escaped by her." (p. 484). However, the Seventh Circuit in its decision herein, has made the execution of a stipulation

"absolute and conclusive" evidence of a joint return although the documents attached to such stipulation do not warrant such determination.

3. Whether the decision below raises significant and recurring problems concerning application of the Holland v. U.S., and allied net-worth cases concerning how to arrive at correct and accurate tax liability.

The decision below ignores generally accepted accounting principles in the computations involved in the net worth, non-deductible expenditures method of computing income tax liability. It enunciates principles in conflict with principles set forth in the Holland v. U.S., and allied net worth cases, concerning the application of the principle of deductiability,

contrary to the express language of the statute, in determining that liability for accrued income tax is "impossible and impermissible" as a deduction. It further applied the technical term "deductibility" to a reduction of assets (in the static balance sheet component of the reconstruction of income computation) rather than limiting the term "deductibility" to proper application to the fluid concept of income (as in a profit and loss statement). This application is an example of the inherent hazards referred to in the Holland decision. The Seventh Circuit acknowledges that, "A net worth statement which does not reflect all liabilities does not accurately reflect a person's financial status," and further acknowledges that, "* good non-tax accounting practices" require inclusion

of accrued income tax liability in the opening and closing net worth statements. No justification is expressed for its determination that such inclusion in tax computations is "impossible and impermissible", except the fallacious application of the concept of deductibility to a reduction of gross income, in arriving at taxable net income.

Section 26 USCA, Sec. 63(a), defines taxable income, and Section 26 USCA, Sec. 161, et seq. specify what expense items are deductible from gross income to arrive at taxable income. Sec. 261 et seq., specify which items are not "deductible" from gross income to arrive at taxable income, including Sec. 275, which states that federal income taxes are not "deductible." The unwarranted expansion of the

term "deductible" beyond matters relevant to income ignores the fact that the net worth plus non-deductible expenditure method of reconstructing income embraces two separate elementary and basically different accounting concepts to-wit:

a) The static concept of a balance sheet which gives the net worth amount which then is separately utilized in the conversion of this static concept into

b) the fluid concept of income.

The misconstruction of the term "deductible" to the schedule of liabilities in the balance sheet portions of the computations results in an erroneously inflated net worth amount. An erroneous and inaccurately inflated taxable income amount unavoidably results.

4. Whether the Internal Revenue service, an administrative agency, violates the basic concept of separation of powers, by imposing arbritary methods of computations in the reconstruction of a taxpayer's income.

There is no statutory authority which mandates that accrued federal income taxes should not be included in the schedule of liabilities in the net worth, non-deductible expenditures method of computing taxable income. The consistent omission of this item by the Internal Revenue Service, an administrative agency, without legislatively prescribed standards, is arbitrary, and violates the principle of separation of powers under the United States Constitution and results in the violation

of due process of law under the Fifth Amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JACK C. BROWN,
Attorney for Petitioners

F. LAURENCE ANDERSON, JR.
Of Counsel.

December 19, 1969.

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM 1968--APRIL SESSION, 1969

Estate of Hutchen Upshaw, Deceased, Ardenia Upshaw, Administratrix, and Ardenia Upshaw, Individually Petitioners-Appellants, v. Commissioner of Internal Revenue, Respondent-Appellee.	)	17258 Petition for Review of Order Decision of the Tax Court of the United States
AND		
Estate of Hutchen Upshaw, Deceased, Ardenia Upshaw, Administratrix Petitioner-Appellant, v. Commissioner of Internal Revenue, Respondent-Appellee.	)	17259

SEPTEMBER 23, 1969

Before Duffy, Senior Circuit Judge, Fairchild, Circuit Judge, and Beamer, District Judge. [1]

Beamer, District Judge. Hutchen Upshaw (Hutchen) and Ardenia Upshaw (Ardenia) were husband and wife residing in Gary, Indiana. For the years 1953 and 1958 they filed joint income tax returns as husband and wife. For the years 1954 through 1957, Hutchen filed individual returns in which Ardenia did not join. On May 3, 1961, the Commissioner of Internal Revenue (Commissioner) assessed deficiencies and under date of June 30, 1961, he notified appellants of the assessment of deficiencies in their reported income for each year 1953 through 1958, together with a computation of tax, penalties and interest on the adjusted gross income as found by the Commissioner.

On September 27, 1961, Hutchen and Ardenia filed their petition with the Tax Court asking for a redetermination of the deficiencies set forth in the Commissioner's notice for the years 1953 and 1958 for which they filed joint returns. On the same date, Hutchen filed a similar petition with the Tax Court covering the years 1954 through 1957, the years for which he had filed individual returns.

During the pendency of the cases in the Tax Court Hutchen died and Ardenia was appointed administratrix of his estate and was substituted for him in the Tax Court proceedings.

The two actions in the Tax Court were consolidated for trial and opinion. After trial, the Tax Court issued its opinion upholding the deficiency determinations made by the Commissioner. From this decision the appellants appeal. We affirm.

In the Tax Court proceedings, the parties stipulated that the understatement of adjusted gross income in appellants' tax returns, subject to one exception, were as follows:

Year	Amount of Understatement
1953*	$ 19,613.13
1954	37,964.31
1955	99,691.94
1956	111,702.15
1957	159,915.18
1958*	173,184.59

*Joint returns of Hutchen and Ardenia Upshaw.

The taxpayers, whose taxable income was computed by the Commissioner on the net worth basis, took exception to the amount of understatement of income listed above on the grounds that the Commissioner improperly failed to include accrued tax liabilities in computing the net worth of the taxpayers for the various years.

The result of the jeopardy assessments made by the Commissioner and affirmed

by the Tax Court are as follows:

Year	Tax	Additions To Tax	Interest
1953*	$ 36,140.16	$ 30,404.38	$15,466.50
1954	67,031.71	39,898.62	24,329.76
1955	146,803.38	73,511.05	44,475.40
1956	179,965.15	89,982.58	43,724.14
1957	232,897.58	116,448.79	42,610.74
1958*	257,500.39	128,750.20	31,661.96

*Joint returns.

The contentions of appellants raised on appeal are that, (1) The Commissioner did not sustain his burden of proving that Hutchen Upshaw was guilty of fraud with intent to evade taxes for the years 1953 through 1958 and that at least part of the underpayment each year was due to such fraud, (2) Ardenia should not be charged with the additional tax, penalties, and interest assessed by the Commissioner for the years 1953 and 1958, (3) the statute of limitations bars recovery of the tax and additions to tax assessed by the Commissioner for the years 1953 and 1958 and (4) that the Commissioner erred in failing to subtract the accrued liability for each year in question in computing taxpayer's net worth.

The Facts

In the Tax Court the parties filed a stipulation of facts, which insofar as

it is pertinent to the issues here, is summarized as follows.

Hutchen Upshaw was born in Alabama in 1910. At age 9 he moved to Indiana Harbor, Indiana, where he attended school through the 10th grade. At age 16, he left school and went to work in foundries and at odd jobs. In 1940 he was adjudged a bankrupt and in September, 1944, all his available assets, in the amount of $30.00, were distributed. While working as a welder in a local industry, he was active as a policy agent (gambler) until 1950. During the ensuing 15 months he worked exclusively as a policy agent. In November, 1951, he became active as a principal in a gambling enterprise called the Lucky Strike Policy Wheel. In August of 1953, he bought a tavern in Gary, Indiana, and from that time through 1958, his gambling activities were conducted from the rear room and basement of the tavern.

Hutchen and Ardenia were married for more than 19 years. Ardenia filed joint income tax returns with Hutchen for the years 1953 and 1958. She had a Bachelor's Degree in Education from Indiana University and taught school in Gary in the 1954-1955 school year, receiving salary of $1,372.37 in 1954 and $3,120.17 in 1955. She filed separate tax returns in 1954, 1955, and 1957. None of the assets contained in the Commissioner's net worth statement were acquired with money earned by her.

During the years 1953-1958 Hutchen engaged in various income-producing activities, consisting of operating policy and lottery, bookmaking, money lending, renting property, buying and selling stocks and other securities and operating a tavern. He was arrested 11 times and convicted once between 1949 and 1959 on various charges related to his gambling activities. He filed income tax returns for the years in question showing adjusted income as follows: 1953* - $5,000, 1954-$10,050, 1955- $17,428.60, 1956-$27,700, 1957-$33,083.99, and 1958*- $74,983.59.
(*Joint returns with Ardenia).

Subject to the exceptions noted herein, the understatement of adjusted gross income found by the Commissioner for the various years involved, as listed above, is correct.

In addition to the stipulation, the Tax Court made findings as to other facts based on the evidence.

During the years at issue, Hutchen failed to maintain adequate books. One of the reasons he failed to do so was to prevent use of any records of his gambling activity as evidence against him if seized by state authorities. In his policy activities he dealt in cash. The appellants received no inheritance, gifts, or other nontaxable income.

Hutchen attended an interview with an Internal Revenue Service agent on December 1, 1968, to discuss his tax problems for 1953 through 1958. He answered all questions. He identified seven pieces of real estate owned by him. As of December 31, 1968, he actually owned no less than 16 separate parcels of real estate. He was asked the cost of remodeling his property at 1700 Massachusetts Street in Gary, to which he replied he thought it was between $13,000 and $15,000. He had purchased the property in June of 1956 and from that date until December 31, 1968, he had expended $124,935.45 in capital improvements on the building.

When Hutchen was asked to identify automobiles he owned, he listed only a 1958 Mercury. During 1958 he also owned a 1958 Lincoln Continental, purchased in 1957.

The evidence also showed that he acquired real estate and automobiles during the years in issue valued at approximately $29,000 in the name of his mother-in-law, an employee, a brother and in his wife's maiden name.

In 1961, Hutchen was indicted by a Federal Grand Jury for unlawfully and knowingly attempting to evade a large part of his federal income tax for the years 1955, 1956, 1957 and 1958. He entered a plea of guilty to the 1958

charge and was sentenced to 5 years in prison and fined $10,000. The charges pertaining to the other years were then dismissed.

The Fraud Issue

Section 293(b) of the 1939 Internal Revenue Code, and section 6653(b) of the 1954 Code provide for the assessment of a penalty of 50% of the total amount of the deficiency if any of the deficiency is due to fraud with intent to evade tax. The presumption of correctness attaching to the Commissioner's determination of a deficiency does not attach to a determination of fraud. The fraud of a given taxpayer is a matter of fact which the Commissioner must establish through clear and convincing proof. Steiner v. Commissioner, 350 F2d 217, (C.A. 7, 1965). In an action before the Tax Court, it, as the original trier of fact, must examine the entire record to decide if the Commissioner established fraud. Teitelbaum v. Commissioner, 294 F.2d 541, 547 (C.A. 7, 1961) cert. denied 368 U.S. 987 (1962).

Because the question of fraud is an issue of fact, the Tax Court's findings settle the matter unless they are clearly erroneous. Helvering v. Kehoe, 309 U.S. 277, 279 (1940), Mensik v. Commissioner, 328 F.2d 147, 150 (C.A. 7, 1964) cert. denied, 379 U.S. 827 (1964).

Some of the factors the Tax Court may take into consideration in determining whether the taxpayer was guilty of fraud with intent to evade taxes are: persistent understatement of income over a period of years, failure to keep adequate records and books, misstatement of facts to a revenue agent and concealing ownership of property. All of these factors are present here.

According to the stipulation filed in the Tax Court, the appellants understated their adjusted gross income 3.4 times for 1958 and 4.9 times for 1953. Hutchen understated his adjusted gross income 4.8 times for 1954, 6.7 times for 1955, 5 times for 1956 and 5.8 times for 1957. For example, the reported adjusted gross income reported for 1958 was $74,983.59. The corrected adjusted gross income was $254,038.18, resulting in an understatement by the taxpayers of $173,184.59, making the ratio of corrected to reported gross income 3.4. This was the smallest ratio for any of the years involved.

While a mere understatement of income does not conclusively establish fraud, a consistent pattern of understatement of substantial amounts of income over a period of years is not a mere understatement and is persuasive evidence of a fraudulent intent to evade taxes. Holland v. United States, 348 U.S. 121, 139 (1954). In Kramer v. Commissioner, 389

F.2d 236 (C.A. 7, 1968), this Court held that this factor alone was sufficient to sustain a finding of fraud with intent to evade taxes.

In addition, the evidence here shows that Hutchen failed to keep adequate books and records as required by section 6001 of the Code and Treasury Regulations section 1.6001-1(a) which applied to all years except 1953. *Section 54(a) of the* 1939 Code imposed a similar requirement with respect to 1953 taxes. The failure to keep such adequate records is a strong indicium of fraud with intent to evade taxes. Bryan v. Commissioner, 209 F.2d 822 (C.A. 5, 1954).

The evidence shows that Hutchen also made material misstatements of facts concerning the ownership of property and of the cost of remodeling buildings to a revenue agent. This is also an indicium of fraud with intent to evade taxes. Gromacki v. Commissioner, 361 F.2d 727 (C.A. 7, 1966.)

Hutchen also concealed his ownership of property by holding title in the names of relatives and employees. This is evidence of fraud with intent to evade taxes. Furnish v. Commissioner, 262 F.2d 727, 729 (C.A. 9, 1958).

Finally, with respect to his 1958 taxes, Hutchen pled guilty to a criminal charge of wilfully and knowingly attempt-

ing to evade taxes. This constitutes an admission of fraud, which is competent evidence in a civil proceeding. Logan Square Auto Mart v. Commissioner, 291 F.2d 136, 140 (C.A. 7, 1961).

On the basis of the record, we conclude that there was ample evidence to sustain the Tax Court's finding of fraud with intent to evade the payment of taxes for each of the years involved.

Ardenia's Liability for the Additional Tax and Additions to the Tax for the Years 1953 and 1958.

Ardenia contends that she should not be liable for the additional tax, fraud penalties and interest for the years 1953 and 1958 because she was an innocent wife who did not participate in any fraudulent intent to evade taxes, had no income of her own for those years, and did not file joint returns with her husband. Moreover, she contends that the effect of the Tax Court's decision is to deprive her of property without due process of law in violation of the 5th Amendment to the Constitution of the United States.

These issues are raised here for the first time and were not presented to the Tax Court for determination. Under the familiar rule, we need not decide the merits of claims or issues which the Tax

Court had no opportunity to decide, Kelly v. Commissioner, 228 F.2d 512, 516 (C.A. 7, 1956). We have, however, considered Ardenia's contentions and find them groundless. This is especially true in view of the fact that the joint petition of the Upshaws filed in the Tax Court alleges that the 1953 and 1958 returns were joint returns and the stipulation of fact entered into by all parties also says that these returns were joint. Ardenia was a party to the Tax Court proceedings and had full opportunity to litigate the question of joint returns and her husband's fraudulent intent to evade taxes. She stipulated that the 1953 and 1958 returns were joint, and the question of her husband's fraud was fully litigated. Therefore, her 5th Amendment rights to due process were fully accorded her.

Sections 51(b) of the 1939 Code and 6013(d)(3) of the 1954 Code provide that if a joint return is made, the liability with respect to tax shall be joint and several. The courts have uniformly held that the wife is liable for all additional taxes, including penalties for fraud, when she joins in the filing of a joint return, regardless of lack of knowledge or fraudulent intent on her part. Prokop v. Commissioner, 254 F.2d 544 (C.A. 7, 1958); Horn v. Commissioner, 387 F.2d 621 (C.A. 5, 1967); Moore v. U.S., 360 F.2d 353, 357 (C.A. 4, 1965), cert. denied 385 U.S. 1001 (1967); Ginsberg's Estate v.

Commissioner, 271 F.2d 511 (C.A. 5, 1959); Furnish v. Commissioner, 262 F.2d 727 (C.A. 9, 1958); Kann v. Commissioner, 210 F.2d 247, 252 (C.A. 3, 1953), cert. denied 347 U.S. 967 (1954) and Howell v. Commissioner, 175 F.2d 240 (C.A. 6, 1949).

The Statute of Limitations

Ardenia contends that the tax returns for 1953 and 1958 were not joint returns, therefore the 3-year statute of limitations imposed by Section 6501(a) of the 1954 Code had run as to her.

As noted above, she stipulated in the Tax Court that the 1953 and 1958 returns were joint returns. She offered no evidence in the Tax Court to the contrary. The 1953 return bears her signature and the appellants took advantage of all the benefits derived from filing a joint return. There is no contention that her signature was obtained by fraud, mistake or duress. The 1958 return filed on July 15, 1959, was signed for both taxpayers by a Certified Public Accountant under separate powers of attorney executed by Hutchen and Ardenia which the Commissioner found acceptable. Again, the appellants took advantage of all the benefits incident to a joint return. There is no evidence that the power of attorney executed by Ardenia was repudiated. She contends only that it was not on the form prescribed by the Internal Revenue Service and it did not expressly

authorize the accountant to execute the tax return on her behalf. However, if she intended to file a joint return, it may be found to be such even though she did not sign it or expressly authorize it to be signed for her. Heim v. Commissioner, 251 F.2d 44 (C.A. 8, 1958); Kann v. Commissioner, 210 F.2d 247 (C.A. 3, 1953) cert. denied 347 U.S. 967 (1954). There is no evidence that Ardenia did not intend to file a joint return for 1958. To the contrary, her petition and stipulation in the Tax Court are conclusive evidence that she did intend to file a joint return.

The 1958 return was filed July 15, 1959. The jeopardy assessment was made on May 3, 1961, with notice on June 30, 1961, well within the statutory period.

Under section 276(a) of the 1939 Code and section 6501(c)(1) of the 1954 Code, the tax may be assessed at any time where the taxpayer made a false or fraudulent return to evade taxes. As we have pointed out above, there was ample evidence to sustain the Tax Court's finding that there was fraudulent intent to evade taxes in 1953. Therefore, there was no bar to the assessment for 1953. U.S. v. England, 376 F.2d 381 (C.A. 7, 1967).

Failure to Subtract Accrued Federal Income Tax Liability in Arriving at Taxpayers' Net Worth.

Appellants contend that the Tax Court

erred in accepting the Commissioner's net worth statement for each year involved without first deducting the accrued federal tax liability. In other words, they contend that the opening and closing net worth statement should include the accrued income tax liability at each point in time.

As a matter of good non-tax accounting practices, they are correct. A net worth statement which does not reflect all liabilities does not accurately reflect a person's financial status. The purpose of opening and closing net worth statements in a case such as this, however, is not to accurately reflect a person's total financial status, but is one step in computing the person's taxable income.

The net worth method of computing taxable income involves establishing the difference between a person's net worth at the beginning and end of the taxable period; adding thereto all non-deductible expenditures made during the year; and then subtracting all non-taxable income--such as gifts. If the income tax accrued on unreported income from prior years is subtracted from the opening net worth statement, it must also be subtracted from the closing net worth statement; the change in net worth will remain the same. Obviously, this would involve no more than additional computation without effect on the ultimate result--taxable income.

On the other hand, if the unpaid tax on unreported income which accrues during the year is subtracted on the closing net worth statement, there would be a sizeable reduction in the closing net worth and an equivalent reduction of taxable income for the year. This deduction is both impossible and impermissible. It is impossible because the amount of accrued and unpaid tax cannot be determined until such time as the taxable income is determined and this will not be fixed until the closing net worth is established. The deduction is impermissible because it would defeat the purpose of the net worth method of computing tax liability--which is to reconstruct the taxpayer's taxable income.

Expenditures for income tax are not tax deductible. All taxpayers are required to report that portion of their income which they use to pay the tax. If the accrued and unpaid tax is deducted from the closing net worth statement in such a manner as to reduce the delinquent taxpayer's reported income by the amount of the tax, it would give such a taxpayer an illegal deduction not granted to those filing proper returns and keeping proper records.

We hold, therefore, that the Tax Court did not err in accepting the Commissioner's computation of the taxpayers' net worth. Romm v. Commissioner, 255 F.2d 698 (C.A. 4, 1958), cert. denied, 356 U.S. 833 (1958); Schultz v. Commissioner, 278 F.2d 927, 931-33 (C.A. 5 1960).

Finally, we find no merit in appellants' contention that the Tax Court erred in not determining whether the rule of collateral estoppel applied to Ardenia for the additional tax and penalties assessed for 1958 because of Hutchen's conviction for tax fraud for that year. Since, as we have shown, there was ample evidence of fraud with intent to evade taxes, independent of the criminal conviction, she would be no better off if that issue was decided in her favor.

For the reasons stated herein, the decision of the Tax Court is

ARRIRMED.

A true Copy:

Teste:

.....
Clerk of the United States
Court of Appeals for the
Seventh Circuit

[1] Judge Beamer is setting by designation from the Northern District of Indiana

T. C. Memo. 1968-123

TAX COURT OF THE UNITED STATES

HUTCHEN UPSHAW and ARDENIA UPSHAW, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

HUTCHEN UPSHAW, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 94564, 94565. Filed June 24, 1968.

F. Laurence Anderson, Jr. and Jack C. Brown for the petitioners.

George P. Adinamis, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WITHEY, Judge: Respondent determined income tax deficiencies and additions to the tax in these consolidated cases as follows:

		Additions to tax				
		I.R.C. 1939			I.R.C. 1954	
Year	Deficiency	Sec. 294 (d)(1)(A)	Sec. 293(b)	Sec. 291(a)	Sec. 6653(b)	Sec. 6654(a)
1953)[1]	$ 36,140.16	$3,299.26	$18,070.08	$9,035.04	$ --	$ --
1958)	257,500.41	--	--	--	128,750.20	--
1954)[2]	67,031.71	6,382.76	--	--	33,515.86	--
1955)	146,803.38	--	--	--	73,401.69	135.45
1956)	179,965.15	--	--	--	89,982.58	--
1957)	232,897.58	--	--	--	116,448.79	--

[1]Docket No. 94564, joint return of Hutchen and Ardenia Upshaw.

[2]Docket No. 94565, individual return of Hutchen Upshaw.

The issues presented for determination are:

(1) Whether respondent erred in the computation of petitioners' income tax deficiencies by means of the net worth-nondeductible expenditure method because of (a) his failure to reflect petitioners' accrued Federal income taxes for the years 1953 through 1958 as liabilities in the net worth statement, and (b) his addition to annual increases in net worth of nondeductible losses on disposition of personal automobiles incurred by petitioners.

(2) Whether petitioners filed false and fradulent income tax returns for the years 1953 through 1958 with the intent to evade tax, and whether any part of the underpayment of tax in those years was due to fraud so as to justify the imposition of the addition to tax for fraud.

(3) Whether petitioners are collaterally estopped from denying the assertion of an addition to tax for fraud for the taxable year 1958.

(4) Whether defidiencies in income taxes and additions to the tax for the years 1953 through 1957 are barred by the applicable statute of limitations.

(5) Whether additions to tax for failure to file declarations of estimated tax in the years 1953 and 1954 under section 294(d)(1)(A) of the Internal Revenue Code of 1939, and for failure to file a timely income

tax return for the year 1953 under section 291(a) thereof, are applicable.

(6) Whether petitioners are liable for an addition to tax for the year 1955 for failure to pay estimated income tax under section 6654(a) of the Internal Revenue Code of 1954.[1]

FINDINGS OF FACT

All facts which have been stipulated are found and made a part hereof by reference.

Petitioners Hutchen Upshaw and Ardenia Upshaw are husband and wife and resided in Gary, Indiana, at the time the petitions in this proceeding were filed. On March 9, 1955, they filed a delinquent joint Federal income tax return for the year 1953 with the district director, Indianapolis, Indiana, and they filed their joint Federal income tax return for the year 1958 with the district director, Chicago, Illinois. Hutchen Upshaw, a cash basis taxpayer, filed individual tax returns for the years 1954, 1955, 1956, and 1957 with the district director, Indianapolis, Indiana. Since Ardenia Upshaw is a party to these proceedings only because she filed joint income tax returns for the years 1953 and 1958, Hutchen Upshaw will hereafter be referred to as the petitioner.

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[1] All references are to the Internal Revenue Code of 1954, unless stated otherwise.

Petitioner was born in Pittsview, Alabama, on November 20, 1910. During his formative years he lived with his mother in rural Alabama until the age of nine, when she died. He thereafter lived with his father, his stepmother, and her three daughters in Indiana Harbor, Indiana. Petitioner completed 2 years of high school before terminating his formal education at the age of 16 to work in foundries and at odd jobs, which included shining shoes, running errands, delivering papers, and groceries, cleaning pool rooms, and shoveling coal.

Petitioner was adjudged a bankrupt in 1940, which bankruptcy was concluded in 1944 with a distribution of all assets of the bankrupt in the amount of $30.

Petitioner was active as a policy agent, i.e., a gambler, and at the same time was employed as a welder by the American Steel Foundry Co. of East Chicago, Indiana, until September 1950. Thereafter, for a period of about 15 months, he was exclusively engaged as a policy agent. He began activities as a principal in such gambling activities in November 1951 and continued doing business as The Lucky Strike Policy Wheel throughout the years in issue (1953 through 1958). In August 1953, petitioner purchased a tavern at 1913 Broadway, Gary, Indiana. Since that time the policy activities were operated from the rear of the tavern and from the basement at 1913

Broadway. Petitioner was the only person authorized to sign checks on the tavern bank account.

During the taxable years 1953 to 1958, inclusive, the petitioner was engaged in various income-producing activities including policy and lottery operations, bookmaking operations, money lending, rental operations, buying and selling stocks and other securities, and the operation of the tavern. Petitioner's criminal record discloses one conviction during the years 1945 to 1959 on a charge connected with his policy operations and activities.

Petitioner and Ardenia Upshaw, hereinafter referred to as Ardenia, have been married for over 19 years. Ardenia graduated from Indiana University in June 1954 with a Bachelor of Science degree in education. She was employed as a teacher by the school system of the City of Gary during the 1954-1955 school year. Subsequently, Ardenia returned to the University of Indiana to pursue a master's degree in education. Petitioner resided with Ardenia at 1913 Broadway, Gary, Indiana, from 1953 to April 1959, when they moved into their new home at 1987 Taft Street, Gary, Indiana.

In the years 1953 through 1958 Ardenia had no income except for wages of $1,372.37 in 1954 and $3,120.17 in

1955 received from the City of Gary school system. None of the assets contained in the net worth computations of respondent for the years 1952 to 1958, inclusive, were acquired with moneys earned by Ardenia. Ardenia filed individual income tax returns for the years 1954, 1955, and 1957. She did not file a return for 1956.

Petitioner filed Federal income tax returns for the taxable years 1947 through 1952 indicating no tax liability for the years 1947 through 1950 and income tax liability for the years 1951 and 1952 in the amounts of $207 and $405, respectively.

Petitioner's adjusted gross income and tax liability as disclosed on the Federal income tax returns filed by him in the years 1953 through 1958 are as follows:

Year	Adjusted gross income	Tax liability
1953[1]	$ 5,000.00	$ 599.40
1954	10,050.00	2,079.00
1955	17,428.60	3,905.80
1956	27,700.00	8,960.00
1957	33,083.99	14,450.07
1958[1]	74,983.59	33,830.44

[1]Joint return.

On May 3, 1961, jeopardy assessments were made against petitioners for income taxes and additions to tax as follows:

Year	Tax	Additions to tax	Interest
1953[1]	$ 36,140.16	$ 30,404.38	$15,466.50
1954	67,031.71	39,898.62	24,329.76
1955	146,803.38	73,511.05	44,475.40
1956	179,965.15	89,982.58	43,724.14
1957	232,897.58	116,448.79	42,610.74
1958[1]	257,500.39	128,750.20	31,661.96

[1]Joint return.

The statutory notices mailed to the petitioners on June 30, 1961, determined deficiencies in income taxes and additions to tax which were the subject of the jeopardy assessments made, as set forth above.

The petitioner duly executed Treasury Form 872's as indicated below

Taxable year	Date executed	Date to which statute of limitations extended
1954	Jan. 23, 1961[1]	June 30, 1962
1955	Dec. 17, 1958[2]	June 30, 1960
1955	April 1, 1960	June 30, 1961
1955	Jan. 23, 1961	June 30, 1962
1956	April 1, 1960[2]	June 30, 1961
1956	Jan. 23, 1961	June 30, 1962
1957	Jan. 23, 1961[2]	June 30, 1962

[1]Date prior to the expiration of the 6-year statute of limitations of section 6501(e).
[2]Date prior to the expiration of the 3-year statute of limitations of

section 6501(a).

During the years involved herein, petitioner failed to maintain adequate books and records of his income. One of the reasons why petitioner failed to keep adequate books and records of his gambling activities was to prevent their use as evidence against him if seized by state authorities. A customary aspect of petitioner's policy business was to deal in cash.

The deficiencies determined by respondent are based upon increases in petitioner's net worth with adjustment for personal living expenses and other nondeductible amounts expended and for certain nontaxable items. The parties have agreed that, subject to two objections of petitioner discussed in the opinion herein, the figures and entries set forth in the net worth statement and computation of adjusted gross income are correct and that the petitioner's understatements of adjusted gross income for the years involved are as follows:

Year	Amount of understatement
1953[1]	$ 19,613.13
1954	37,964.31
1955	99,691.94
1956	111,702.15
1957	159,915.18
1958[1]	173,184.59

[1]Joint Return.

Petitioners during the years 1953 to 1958, inclusive, did not receive nontaxable income such as gifts and inheritances or other nontaxable receipts, except for the nontaxable portion of capital gains in 1957 and 1958 and nontaxable insurance dividends in 1957 and 1958, as set forth in respondent's computation of adjusted gross income.

Upon the request of internal revenue agents, petitioner attended an interview on December 1, 1958, to discuss his tax returns for the years 1953 through 1957. At that conference, petitioner responded to all the questions the agents propounded. During the interview, petitioner was asked to identify any real estate he held. In response, he identitied property owned by him located at 1700 Massachusetts, 1913 Broadway, 2473 Buchanan Street, and 1524 Virginia Street, all in Gary Indiana. The revenue agent then named two more parcels of realty which he had reason to believe petitioner owned whereupon petitioner acknowledged ownership thereof. When petitioner was asked what real estate holdings he had outside of Lake County, Indiana, he stated that he owned a piece of property in Cleveland, Ohio, and that he owned no other.

At the same interview, petitioner was asked what the cost of remodeling the property located at 1700 Massachusetts Street, Gary, Indiana, was to date. Petitioner stated that he thought

it ran between $12,000 and $15,000. When petitioner was asked to identify the automobiles owned by him he stated that he owned a 1958 Mercury station wagon and no other automobiles.

As of December 31, 1958, petitioner owned no less than 16 separate parcels of real estate, one of which was located in Idlewild, Michigan.

The property located at 1700 Massachusetts Street, Gary, Indiana, was purchased by petitioner in June 1956 for $36,500. From June 1956 through December 31, 1958, amounts totaling $124,935.45 were expended by petitioner on capital improvements for this building.

During the year 1958, petitioner owned a 1958, 4-door Lincoln Continental automobile.

The following assets were acquired by petitioner in the names of other persons during the years 1954 through 1956:

Asset	Year acquired	Value	Acquired in the name of
Realty located at 3921 McCook, East Chicago,	1955	$3,465.00	Ardenia Williams (Ardenia Upshaw's maiden

Indiana			name)
1956 Lincoln Premier	1955	6,054.75	Iona Floyd (petitioner's mother-in-law)
1957 Lincoln Premier	1956	6,807.00	Robert Harper (employee of petitioner)
1957 Chrysler Imperial	1956	6,300.00	Robert Upshaw (petitioner's younger brother
International Harvester dump truck	1954	7,373.51	Ardenia Williams

On May 12, 1961, the Federal grand jury at Hammond, Indiana, returned an indictment in Criminal Action No. 3206, United States of America v. Hutchen Upshaw, petitioner herein, which charged in four separate counts that Hutchen Upshaw did willfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by

him for the years 1955, 1956, and 1957 and by him and his wife for the year 1958 to the United States of America by preparing and causing to be prepared and signing false and fradulent income tax returns in violation of section 7201 of the Internal Revenue Code of 1954.

The United States District Court for the Northern District of Indiana, Hammond Division, on October 6, 1961, upon petitioner's plea of guilty, entered its judgment of conviction against petitioner on Count IV of the above indictment relating to the year 1958. Petitioner was sentenced to 5 years imprisonment and a $10,000 fine.

ULTIMATE FINDINGS OF FACT

Respondent did not err in his net worth-nondeductible expenditures computation of petitioner's understatements of adjusted gross income for the years 1953 to 1958, inclusive.

In each of the years in issue herein, petitioner has filed a false and fraudulent income tax return with intent to evade tax. At least a part of the deficiency for the year 1953 and of the underpayments of tax for the years 1954 through 1958 were due to the fraud of the petitioner with intent to evade tax.

OPINION

Deficiencies

Petitioner stipulates to the correctness of the items contained in respondent's net worth computation of the deficiencies herein subject to one objection thereto and to respondent's computation of adjusted gross income subject to an objection to one item thereof.

Petitioner's first contention is that the respondent's determination of petitioner's income tax deficiencies under the net worth-nondeductible expenditures method of reconstructing taxable income is erroneous because respondent arbitrarily excluded petitioner's accrued income tax liabilities from the schedule of liabilities in the net worth computation. Petitioner argues that the fact that Federal income taxes are not deductible in computing "taxable income" does not mean that they are not liabilities properly to be included in the net worth computation, and that respondent's failure to so include these accrued taxes in the computation "creates a fallacious and false determination of adjusted gross income."

Even assuming petitioner's premise that a cash basis taxpayer may utilize an accrual method net worth computation (i.e., accrued taxes as a liability in the net worth statement), petitioner's contention therefrom is without merit. What petitioner fails to realize is that if, as he argues, accrued Federal taxes are to be subtracted as a liability in computing

the increase in net worth for a particular year, they then become a nondeductible accrued item which must be added back as an adjustment to the increase in net worth for that year.[2] Thus, petitioner's accrued tax liability is, in effect a "wash" item in the net worth computation.

An argument similar to petitioner's was made by the taxpayer in the case of Romm v. Commissioner, 255 F.2d 698 (C.A. 4, 1958), affirming an unreported Tax Court Order, and was rejected by the Court as follows:

> Here credit is sought for Romm's own federal taxes and penalties, as a deduction from his annual increase in net worth. Whether income is ascertained by the net worth method of computation or otherwise, it is a fundamental in our tax laws that a taxpayer may not deduct from his annual taxable income the amount of his federal tax or penalties; the Internal Revenue Code will not permit it. * * *

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[2] Under both the 1939 and 1954 Internal Revenue Codes, Federal income taxes are a nondeductible expense. Sec. 23(c)(1)(A), I.R.C. 1939; sec. 164(b)(1), I.R.C. 1954, for taxable years ending before December 31, 1963; now section 275.

Therefore, we hold respondent did not err in failing to reflect petitioner's unpaid Federal income taxes as liabilities in computing petitioner's income tax deficiencies by means of the net worth-nondeductible expenditure method. Cf. Schultz v. Commissioner, 278 F.2d 927, 931 (C.A. 5, 1960).

Petitioner's second contention is that the nondeductible losses on disposition of personal automobiles should not be added to annual increases in net worth in computing corrected adjusted gross income. He argues that such additions are duplications of the sums already included in the acquisition costs of replacement vehicles. Petitioner's argument evidences a lack of understanding of respondent's calculations in regard to the automobiles. Respondent's calculations have two aspects.[3] First, the new car is treated as an asset with a tax basis consisting of the cash paid plus the cash trade-in allowance for the old car. Second, the loss on the old car, computed as the difference between its adjusted tax basis and the cash trade-in allowance, is then added back to net worth increase as a nondeductible personal expenditure. This unrecovered cost basis in the old automobile is not reflected in the net worth

[3]See Schmidt, Legal and Accounting Handbook of Federal Tax Fraud, Prentice-Hall, Inc. (1963), p. 324.

increase as part of the acquisition cost. Only the recovered cost basis of the old auto, i.e., its trade-in allowance is included in the acquisition cost.[4]

If the unrecovered cost basis were not added to the increase in net worth for the year involved, the petitioner would, in effect, have a loss deduction for the unrecovered portion of the initial cost basis, which loss is personal in nature and thus not an allowable deduction for tax purposes. Therefore, we hold that the respondent did not err in adding the nondeductible losses on disposition of personal automobiles to the net worth increases in computing corrected adjusted gross income.

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[4]To illustrate, if a taxpayer with a personal automobile that cost $2,000, trades it in on a new car with a purchase price of $3,000 and is allowed $500 for the old auto, the nondeductible loss is $1,500 ($2,000 purchase price minus $500 trade-in allowance), and the basis of the new auto is $3,000 ($2,500 cash paid plus $500 trade-in allowance). The $1,500 unrecovered cost basis on the old auto is not reflected in the $3,000 acquisition cost of the new auto.

Additions to Tax

The next issue is whether the petitioner is guilty of fraud with intent to evade tax and therefore subject to additions to tax under section 293(b), I.R.C. 1939[5] and section 6653(b), I.R.C. 1954[6]. Respondent bears the burden of proving fraud, which proof must be by "clear and convincing evidence"; M. Rea Gano, 19 B.T.A. 518 (1930); Carter v. Campbell, 264 F.2d 930 (C.A. 5, 1959).

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[5]SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY. (b) Fraud.--If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

[6]SEC. 6653. FAILURE TO PAY TAX. (b) Fraud. --If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

It is well established that continued understatement of large amounts of taxable income is evidence of fraudulent intent to evade taxes. Richard F. Smith, 31 T.C. 1 (1958); Luerana Pigman, 31 T.C. 356 (1958); Lillian Kilpatrick, 22 T.C. 446 (1954), affd. 227 F.2d 240 (C.A. 5, 1955); Rogers v. Commissioner, 111 F.2d 987 (C.A. 6, 1940). In the present case, petitioner has virtually conceded understatements of income totaling approximately $600,000 over a 6-year period, in amounts ranging from $20,000 to $175,000 in a single year. The omissions are of such magnitude and occurred so systematically over the years involved herein as to preclude any inference on our part that they were omitted due to oversight. Cf. Estate of Joseph Nitto, 13 T.C. 858 (1949). However, we do not rest our determination that petitioner acted fraudulently solely on the factor of omission of substantial amounts of income. Other indicia of fraud which we have found to be present are the following: failure to keep adequate books and records, Bryan v. Commissioner, 209 F.2d 822 (C.A. 5, 1954), affirming a Memorandum Opinion of this Court; Leon Papineau, 28 T.C. 54 (1957); material misstatements to a revenue agent, Nathan Bilsky, 31 T.C. 35 (1958); Lillian Kilpatrick, supra; and the concealment of the ownership of certain property of petitioner by holding it in the names of others, Furnish v. Commissioner, 262 F. 2d 727 (C.A. 9, 1958).

In the face of this clear and con-

vincing showing of fraud by the respondent, petitioner's only explanation is that he is a man of limited education and ability with no knowledge of accounting procedures. But as this Court stated in the case of Eugene Vassallo, 23 T.C. 656 (1955):

> An attempt was made to demonstrate petitioner's abysmal ignorance of accounting and bookkeeping methods. It was alleged that he could not read or do other than write his own name and Arabic numerals. Be that as it may, he has been a resident of the United States since 1910 and from the record here it would seem that he has been a successful businessman during the years here in issue. Any man intelligent enough to earn that amount of income must be presumed to be intelligent enough to make an honest effort to report it correctly and pay the tax thereon. Sometimes there are unusual circumstances which excuse a taxpayer's failure to meet the common standards required of all. In this record we find no such circumstances. Rather, we find a blatant disregard for the minimum responsibility required of every taxpayer and a willfully fraudulent and continuing effort to defeat and evade the payment of taxes due by him and by his corporation.

Cf. Webb v. Commissioner, ___F.2d___(C.A. 5, 1968), affirming a Memorandum Opinion of this Court. Similarly, in this case, we find in petitioner's conduct a "blatant disregard for the minimum responsibility

required of every taxpayer," and we are of the opinion that a false and fraudulent return with intent to evade tax was filed for each year, and that at least a part of the underpayment of tax in each of the years in issue herein was due to fraud of the petitioner.

Respondent also argues that both petitioner and his wife are collaterally estopped to deny the assertion of the addition to tax for fraud for the year 1958, wherein they filed a joint return, due to petitioner's conviction for criminal fraud for that year.[7] However, our holding in favor of the respondent on the fraud issue on the merits renders a decision on this contention unnecessary.

As regards petitioner's argument that the deficiencies in tax and additions to tax for the years 1953 through

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[7] Petitioners raise no issue with respect to the joint liability of the wife with respect to additions to tax for fraud based solely on the fraudulent conduct of the husband where a joint income tax return was filed. Louise M. Scudder, 48 T.C. 36 (1967); W.L. Kann, 18T.C. 1032 (1952), affd. 210 F. 2d 247 (C.A. 3, 1953).

1957 are barred by the Statute of limitations, our determination in favor of the respondent on the issue of fraud also resolves this question, sec. 6501 (c)(1), I.R.C. 1954[8], formerly sec. 276 (a), I.R.C. 1939.

The remaining issues for decision are whether petitioner is subject to additions to tax for his failure to file a timely income tax return for the

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8 SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION. (c) Exceptions.--
(1) False Return.--In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment at any time.

* * * * * * *

Furthermore, it appears from the facts that Treasury Form 872's were timely executed thereby extending the statutes of limitations for the years 1954 through 1957 until June 30, 1962, well after the time the respondent sent his notices of deficiency.

year 1953[9], for his failure to file a declaration of estimated tax for the years 1953 and 1954, [10] and for his failure to

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9I.R.C. 1939 SEC. 291. FAILURE TO FILE RETURN. (a) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 percentum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate.
* * *

10I.R.C. 1939 SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT. (d) Estimated Tax.--(1) Failure to File Declaration or Pay Installment of Estimated Tax.--(A) Failure to File Declaration.--In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 percentum of each installment due but unpaid,and in addition, with respect to each such installment due but unpaid, 1 percentum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any install-

pay estimated income tax for the year 1955.[11] The petitioner on brief made no argument with regard to the issues nor has he produced any evidence with respect thereto. Therefore we find that petitioner has abandoned those issues and we decide them for the respondent.

Decisions will be entered under Rule 50.

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10 (continued) ment due but unpaid, exceed 10 percentum of the unpaid portion of such installment. * * *

11 I.R.C. 1954
SEC. 6654. FAILURE BY INDIVIDUAL TO PAY ESTIMATED INCOME TAX.
(a) Addition to the Tax.--In the case of any underpayment of estimated tax by an individual, except as provided in subsection (d), there shall be added to the tax under chapter 1 for the taxable year an amount determined at the rate of 6 percent per annum upon the amount of the underpayment (determinded under subsection (b) for the period of the underpayment (determined under subsection (c)).

TAX COURT OF THE UNITED STATES

ESTATE OF HUTCHEN UPSHAW, DECEASED, ARDENIA UPSHAW, ADMINISTRATRIX, AND ARDENIA UPSHAW, INDIVIDUALLY,
Petitioners
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 94564

DECISION

Pursuant to the opinion of the Court filed June 24, 1968, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED; That there is a deficiency in income tax due from the petitioners for the taxable year 1953 in the amount of $6,155.11, without taking into consideration the jeopardy assessment made in May 1961, of which amount $2,832.60 was paid on July 15, 1960;

That there are additions to the tax due from the petitioners for the taxable year 1953, under the provisions of Sections 291(a), 293(b) and 294 (d)(1)(A) of the Internal Revenue Code of 1939, in the amounts of $1,538.78, $3,077.56, and $600.62, respectively, without taking into consideration the jeopardy assessment made in May, 1961;

That there is a deficiency in income tax due from petitioners for the taxable year 1958, in the amount of $140,418.25, without taking into consideration the jeopardy assessment made in May 1961, of which amount $5,666.60 was paid on October 17, 1961; and

That there is an addition to the tax due from the petitioners for the taxable year 1958 under the provisions of Section 6653(b) of the Internal Revenue Code of 1954, in the amount of $70,219.13, without taking into consideration the jeopardy assessment made in May 1961.

(Signed) G.G. WITHEY

Judge.

Entered: Sep 9 1968

TAX COURT OF THE UNITED STATES

ESTATE OF HUTCHEN UPSHAW, DECEASED, ARDENIA UPSHAW, ADMINISTRATRIX,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 94565

DECISION

Pursuant to the opinion of the Court filed June 24, 1968, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1954, in the amount of $22,195.30, without taking into consideration the jeopardy assessment made in May 1961, of which amount $2,696.59 was paid on June 2, 1961 and $42.58 on June 7, 1961;

That there are additions to the tax due from the petitioner for the taxable year 1954, under the provisions of Section 294(d)(1)(A) of the Internal Revenue Code of 1939 and Section 6653(b) of the Internal

Revenue Code of 1954, in the amounts of $2,235.39 and $11,097.65, respectively, without taking into consideration the jeopardy assessments made in May 1961; and

That the following statement shows the deficiencies in income taxes and additions to the tax due from the petitioner for the taxable years 1955, 1956 and 1957, without taking into consideration the jeopardy assessments made in May 1961:

	Deficiency	Additions to the Tax	
Year	Income Tax	Sec. 6653 (b) 1954 Code	Sec. 6654(d) (1)(A) 1954 Code
1955	$76,332.84	$38,166.42	$135.45
1956	90,021.91	45,010.96	--
1957	134,285.03	67,142.52	--

(Signed) G.G. WITHEY
Judge.

Entered: Sep 9 1968

United States Constitution: Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes, I.R.C. of 1954

Sec. 63, "Taxable income defined. (a) General Rule. Except as provided in subsection (b) for purposes of this subtitle the term 'taxable income' means gross income minus the deductions allowed by this chapter, other than the standard deduction allowed by part IV (sec. 141 and following)."

Sec. 161, "Allowance of deductions. In computing taxable income under section 63(a) there shall be allowed as deductions the items specifi-

ed in this part, subject to the exception provided in part IX (sec. 261 and following relating to items not deductible)."

Sec. 261, "General rule for disallowance of deductions. In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part. Aug. 16, 1954, c. 736, 68A Stat. 76."

Sec. 275, "Certain taxes. (a) General rule.-No deduction shall be allowed for the following taxes:

(1) Federal income taxes, *"

Sec. 6013(d)(3). "If a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 967

ESTATE OF HUTCHEN UPSHAW, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court (Pet. App. 18a-40a) are not officially reported. The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 416 F. 2d 737.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1969. The petition for a writ of

certiorari was filed on December 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below correctly found that petitioner Ardenia Upshaw and her husband filed joint federal income tax returns for the years 1953 and 1958.

2. Whether Section 51(b)(1) of the Internal Revenue Code of 1939 and Section 6013(d)(3) of the 1954 Code, which impose joint and several liability on the makers of a joint federal income tax return, contravene the Fifth Amendment.

3. Whether, in reconstructing a taxpayer's income under the net worth method, it is proper to exclude accrued federal income tax liability from the computation.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 51 [as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] INDIVIDUAL RETURNS.

* * * *

(b) *Husband and Wife.*—

(1) *In general.*—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax

shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * *

(26 U.S.C. (1952 ed.) 51.)

Internal Revenue Code of 1954:

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

* * * *

(d) *Definitions.*—For purposes of this section—

* * * *

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

(26 U.S.C. 6013.)

STATEMENT

During the taxable years here in issue, 1953 through 1958, petitioner Ardenia Upshaw was married to Hutchen Upshaw (R. 20).[1] Throughout this period,[2] Hutchen was engaged in various income-producing activities, including policy, lottery and bookmaking operations, money lending, rental operations,

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[1] "R." refers to the appendix to petitioners' brief in the court of appeals which is lodged with this Court.

[2] Hutchen Uphaw died subsequent to the years in issue (R. 71). Ardenia Upshaw is a party to this proceeding both as administratrix of her deceased husband's estate and as a co-maker of joint tax returns with her husband for 1953 and 1958.

buying and selling stocks and other securities, and the operation of a tavern (Pet. App. 22a). Hutchen failed to maintain adequate books and records of his income (R. 37), in part to prevent the use as evidence against him of any records of his gambling activities (Pet. App. 25a).

For the years 1954-57, inclusive, Hutchen filed separate federal income tax returns (R. 21). For 1953, Hutchen and Ardenia both appeared as signatories on a joint return (R. 78). For 1958, their return, joint in form, was signed on their behalf by a certified public accountant pursuant to separate powers of attorney executed by Hutchen and Ardenia (R. 82, 89, 90).

The Commissioner determined deficiencies in income tax based on increases in Hutchen's net worth (Pet. App. 25a). Petitioners objected to the Commissioner's net worth computation on the ground that he had failed to allow as a liability accrued federal income taxes (R. 33; Pet. 13-18). Subject to this objection and a second objection not relevant here, the parties stipulated on the basis of the Commissioner's net worth computation that adjusted gross income had been understated as follows (R. 27; Pet. App. 25a):

Year	Amount of Understatement
1953*	$ 19,613.13
1954	37,964.31
1955	99,691.94
1956	111,702.15
1957	159,915.18
1958*	173,184.59

* Joint return of Hutchen and Ardenia Upshaw.

A petition for a redetermination of the deficiencies was filed in the Tax Court. Following a stipulation of facts (R. 20-39) and a trial on the merits, the Tax Court accepted the Commissioner's determinations with minor alterations (Pet. App. 30a-33a) and also sustained the imposition of civil fraud penalties (Pet. App. 34a-40a). On appeal, the Seventh Circuit affirmed (Pet. App. 1a-17a).

ARGUMENT

The decision below, affirming that of the Tax Court with respect to both the amount of the deficiencies and the imposition of civil fraud penalties, is correct. There is no conflict or any other basis for further review by this Court.

1. Ardenia contended for the first time in the court of appeals that she and her husband did not file joint returns for 1953 and 1958 (Pet. App. 11a). In their duly verified petition to the Tax Court, they specifically alleged the contrary (R. 7), and, indeed, Ardenia stipulated (R. 20) that joint returns were filed for both years. The Tax Court's finding to this effect (Pet. App. 2a) is supported by this and other evidence (R. 78-93). Ardenia does not deny that she signed the 1953 return; nor does she allege that her signature was procured by fraud or duress. Although she did not sign the 1958 return (R. 82), the law is settled that a return may be a joint return, even though the wife does not sign it, provided she intends to file a joint return. *Heim* v. *Commissioner*, 251 F. 2d 44 (C.A. 8); *Kann* v. *Commissioner*, 210 F. 2d 247 (C.A. 3); *O'Connor* v. *Commissioner*, 412

F. 2d 304 (C.A. 2), taxpayers' petition for certiorari pending, No. 886, this Term. Ardenia does not deny such intent as to 1958, and there is no evidence in the record to support such a denial. To the contrary, all of the relevant facts, and particularly her granting of a power of attorney to the accountant who prepared the 1958 return (R. 89), indicate that she fully intended to file a joint return with her husband for that year. In all events, the question of Ardenia's intent as to both 1953 and 1958 is one of fact, *Federbush* v. *Commissioner*, 325 F. 2d 1, 2 (C.A. 2), and this case thus comes within the established principle that this Court will not usually review a finding of fact concurred in by both courts below. *Comstock* v. *Group of Investors*, 335 U.S. 211, 213-214.

2. Sections 51(b)(1) of the 1939 Code, pp. 2-3, *supra*, and 6013(d)(3) of the 1954 Code, p. 3, *supra*, provide that if a joint return is made, the liability with respect to the tax on the aggregate income shall be joint and several. Consistently with the plain mandate of these provisions and pertinent legislative history,[3] the courts have uniformly held that, unless a wife joins in a return as a result of her husband's fraud or duress, she is liable for all addi-

[3] The provision imposing joint and several liability on both spouses in the case of joint returns was incorporated into the federal tax law in the Revenue Act of 1938, c. 289, 52 Stat. 447, Section 51(b). See the Report of a Subcommittee of the Committee on Ways and Means on Proposed Revision of the Revenue Laws, 75th Cong., 3d Sess., p. 50; H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 29-30.

tional taxes attributable to her husband's understated income and for all fraud penalties attributable to his conduct, even if she is entirely innocent and totally without knowledge of the understated income and fraudulent conduct. *Horn* v. *Commissioner*, 387 F. 2d 621 (C.A. 5); *Moore* v. *United States*, 360 F. 2d 353, 357 (C.A. 4), certiorari denied, 385 U.S. 1001; *Furnish* v. *Commissioner*, 262 F. 2d 727 (C.A. 9); *Prokop* v. *Commissioner*, 254 F. 2d 544 (C.A. 7); *Payne* v. *United States*, 247 F. 2d 481 (C.A. 8); *Kann* v. *Commissioner*, *supra*; *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6).[4] Petitioners give no reason and cite no authority for their assertion that this long-

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[4] In *Scudder* v. *Commissioner*, 405 F. 2d 222 (C.A. 6), petitions for rehearing denied, 410 F. 2d 686, taxpayer's petition for certiorari denied, 396 U.S. 886, the Sixth Circuit granted partial relief to a joint-maker wife from her joint and several liability on the ground that part of the unreported income of her husband had been embezzled or otherwise illegally taken from her directly or indirectly. The court found in the unusual circumstances of *Scudder*, 405 F. 2d at 226, that the husband's conduct was equivalent to fraud, trickery and duress, which, as we have noted, may exempt a spouse from liability even though a joint return is signed. It also held that the innocent spouse was responsible for taxes and fraud penalties that were not attributable to embezzled or illegally taken funds. In *Sharwell* v. *Commissioner*, (C.A. 6), decided December 24, 1969, the Sixth Circuit remanded to the Tax Court for a determination as to whether the rationale of its earlier *Scudder* decision was applicable. While we disagree with *Scudder* and *Sharwell* insofar as they would allow partial relief to wronged spouses, those cases plainly have no bearing here, since Hutchen at no time embezzled, or otherwise wrongfully obtained, funds from Ardenia.

standing rule of joint and several liability violates the Fifth Amendment, and we know of no basis for such a constitutional claim.

3. There is no merit to petitioners' contention that the Commissioner's net worth computation is erroneous because accrued federal income taxes were not taken into account as a liability. As this Court observed in *Holland* v. *United States*, 348 U.S. 121, 131, the net worth method is not a method of accounting. Its purpose is to arrive as nearly as possible at a taxpayer's correct, taxable income—*i.e.*, the taxable income which would have appeared on the tax returns had the taxpayer properly and accurately reported all income and allowable deductions. Tax liability is computed on the basis of a taxpayer's income before taxes (see Section 275 of the 1954 Code). To reflect such taxes in the net worth computation, as petitioners urge, would have the effect of allowing an impermissible deduction for such taxes, and would result in a lower taxable income and lower tax liability than if income and deductions had been reported properly in the first instance. The courts below thus were correct in accepting the Commissioner's net worth computation. Cf. *Romm* v. *Commissioner*, 255 F. 2d 698 (C.A. 4); *Schultz* v. *Commissioner*, 278 F. 2d 927, 931-933 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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